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Supreme Court

October Term, 1947

No. [redacted] 145

TITLE INSURANCE AND GUARANTY COMPANY [illegible] HUMPHREY, HARRY LEE JONES, JULIAN M. EDWARDS and MARJORIE B. EDWARDS,

Petitioners (Appellants below),

vs.

JAMES P. HART, TRUSTEE OF MOUNT GAINES MINING COMPANY, Debtor,

Respondent (Appellee below).

Response to Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1947

No. 1511

TITLE INSURANCE AND GUARANTY COMPANY ELIZABETH HUMPHREY, HARRY LEE JONES, JULIAN M. EDWARDS and MARJORIE B. EDWARDS,

Petitioners (Appellants below),

vs.

JAMES P. HART, TRUSTEE OF MOUNT GAINES MINING COMPANY, Debtor,

Respondent (Appellee below).

Response to Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Ninth Circuit.

Statement of the Case.

The application for a writ of certiorari is another step along the tortuous path through the tangle of litigation that has beset the Mount Gaines mine. Could it speak, it surely would say that it rejoiced that this phase of the litigation had reached the end of the path.

The mine is located in Mariposa County, California, at no great distance from the Yosemite National Park. Some of the ground area included in what is called the Mount

Gaines mine is patented, but a considerable portion is still held under mineral locations, which are frequent sources of litigation.

Respondent does not believe that a discussion of the pleadings or facts, except as to facts recited in the decision of the circuit court or found by the district court, have any place in a statement of the case or argument. A petition for a writ raises no question of the sufficiency of the evidence to support the findings. It is necessary when questions of conflict with other decisions are raised to consider not only the respective statements of law but also to consider the facts in the respective cases to determine whether or not there is an actual conflict. But this court must of necessity confine its consideration to facts as they appear in the decision of the circuit court or the findings of the district court.

However, since petitioners have referred to statements in the pleadings and to evidentiary facts, it is perhaps proper for respondent to make some comments.

The respondent feels that a fair statement of the ultimate facts has been set forth in the majority opinion of the Circuit Court of Appeals and respondent adopts it.

There are some statements made in petitioners' statement of facts which respondent believes are misleading.

Petitioners cite numerous pages of the record in an attempt to show failure by lessee to keep complete records. No difficulty was experienced in arriving at the total returns or total payments of royalties. The difficulty arose

when the auditor was asked to give the status on some particular interim date, or to state whether a certain royalty payment applied to a certain shipment. This difficulty arose from various facts, not because the records were not kept. Perhaps the system could have been improved. But the auditor arrived at the total, checked it so far as returns from ores shipped was concerned with the smelter records, and the owners, it is assumed, kept their own records so they knew the royalties paid. They raised no question as to the correctness of the auditor's testimony in that regard.

Petitioners also make the statement that there were 43 violations of the regulations of the Industrial Accident Commission. Respondent does not know how that figure was reached. Respondent contended that the provision in the lease[1] had no application to the regulations of the Commission. The Circuit Court did not disagree with respondent's contention but stated that assuming the contention was not well taken the violations did not constitute a failure of faithful performance and gave their reasons for so holding. [R. 1427-1428.] The testimony of the representative of the Commission shows that these regulations were treated more as directives. He outlined what the mine inspector did, how he went through the mine with the book of regulations with him so he could check on himself. He stated the inspector made notes and handed

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[1]All operations "shall be in accordance with the laws and mine and milling regulations of the State of California." [R. 39.]

a copy to the operator, that the original was sent to their office, that operator was notified and given ample time to make corrections. If these violations are so dangerous to life and limb as petitioners would argue, it certainly is a most lax way for the commission to protect human life.

The inference from the method used is borne out by the testimony of experienced miners. If we accept the testimony of these men, no operator would accept a lease which had a provision which might subject the lease to forfeiture if an inspector found a violation of these regulations. The testimony shows that rarely does an inspector go through a mine without finding something that does not comply with the regulations.[2]

The lessee had a most excellent record for safety in the operations.[3] Every alleged violation was promptly cor-

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[2]John E. Steele, life-time miner and many years inspector of mines for an industrial insurance company, testified that not a mine in California would be in operation if 110 percent compliance with Industrial Accident Commission's regulations were required. [R. 3680.]

Francis Fredrick, consulting geologist and mining engineer, testified that: "It is a very rare thing to have a California State mine inspector go through a mine and not recommend some improvements * * * sometimes a very strict demand made for performance of regulations within thirty days, but they always allow some time for corrections, because those recommendations are not considered violations." [R. 249.]

[3]"Mount Gaines mine has been run in a very safe manner and with apparent due regard to safety measures," testimony Fredricks. [R. 250, last line.] Premium on insurance 25 percent below manual because of safety record. "Indeed a fine achievement." E. G. Lloyd, underwriting department insurance company. [R. 1046.]

rected except on one occasion when there was some delay, but the correction was made without any trouble for the mine or its operation.

The statement of petitioners with respect to delays in the payment of royalties on pages 11-13 of the petition are magnified by duplication. The first item $1358.70 is included in the third item on that page as can be seen by the date. The same item is again repeated at the bottom of page 12 and again included in the item on the top of page 13.

This item of underpayment occurred during the so-called Humphrey period; that is, when the Humphreys were in the control of the lessee corporation. During that period J. W. Humphrey claimed to be president and general manager of the Mount Gaines Co.

Neither J. W. Humphrey, C. F. Humphrey nor Arthur J. Edwards owned a share of stock in either the Mount Gaines M. Co. or its parent corporation, International M. & M. Co. except a certificate for 25,000 shares that J. W. Humphrey issued to himself and another, in trust. He signed the certificate himself once as vice president and again as secretary. There was no authority for the issuance and of course no consideration paid by Humphrey. A photostat of the certificate is in the record page 1074. The whole story of their temporarily gaining control is not told in this record but is sketched. [R. 1059-1078, 1127-1138.] There are about 1,200,000 shares of International M. & M. Co. stock outstanding, held by 2100 persons.

In any event near the end of April, 1938, J. W. Humphrey and two of his associate directors met with C. F. Humphrey and Arthur J. Edwards, the representatives of the owners who are now objecting to the extension. At that meeting the payment or nonpayment of the April 25th royalty was discussed. Just what transpired is not clear because information had to be procured from the unwilling lips of J. W. Humphrey. [R. 1155-1157.]

That event together with other incidents and evidence was sufficient to convince the district court that it was justified in making a finding that there were full accountings and payments of royalties due under the lease "except for a few payments prior to June 30th, 1939, which with the knowledge, acquiescence and collusion of the owners . . . were permitted to be deferred." [R. 125.]

Immediately after this default some stockholders became active and procured a hearing before the Superior Court of Mariposa County as a result of which the Humphrey group were ousted from the control and management of the company and State Court trustees were appointed.

The group still claimed to be directors and in June of 1939 filed the proceedings in reorganization. They were continued in possession for only two months. On the first hearing the present trustee was appointed. The stars have looked brighter to those who are really interested in the company ever since that appointment.

Petitioners also mention three delays in payment of royalties in 1936. The lease here involved recited that the title to the property was in dispute; that the lessor would attempt to clear the title but provided that in the event of his failure so to do he would not be liable. [R. 38.] The lessee was not required to perform on his part until he had been given notice that the title was clear. [R. 38.]

One A. G. Ilseng had procured an assignment from the original lessees Yates and Binns and he had also procured an assignment of a lease given by those claiming adversely to J. W. Humphrey, and who were in possession. In that way he was able to get into possession and to go ahead with the rehabilitation work. Litigation over the property dragged out and it was not concluded until sometime in 1937. The notice that the title was cleared; that is that J. W. Humphrey was the legal owner and W. H. Holcomb, Harry Lee Jones and C. F. Humphrey, the father of J. W. Humphrey were each the owners of a one-third beneficial interest, was given June 1st, 1937.

Under those circumstances the lessee should have held the royalties until the title was settled. This he did for a considerable period of time on the advice of the attorney for J. W. Humphrey. [R. 766.]

Ilseng prior to this time had organized the Mount Gaines Mining Co. as a wholly owned subsidiary of the parent corporation International Mining and Milling Co. and transferred the lease to that company.

Summary of Argument.

I.

GENERAL STATEMENT APPLICABLE TO ALL REASONS ADVANCED BY PETITIONERS.

II.

RESPONSE TO PETITIONERS' POINTS A AND D.

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3. *No supporting authority to statement of law in Wiemeyer case.*

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6. *There can be no presumption that payments of royalties are payments for reasonable value of use of premises.*
7. *There is no admission in the pleading that trustee had not assumed the lease.*

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1. *Model Dairy case is not a proceeding under any part of Bankruptcy Act.*

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1. *Even Wiemeyer decision recognizes that assumption may be evidenced by acts.*

IV.

RESPONSE TO PETITIONERS' POINTS F AND G.

A. STATEMENT BY CIRCUIT COURT THAT THERE HAD BEEN SUFFICIENT COMPLIANCE WITH CONDITIONS PRECEDENT IS NOT IN CONFLICT WITH CALIFORNIA LAW.

1. *Quoted statement of C. C. A. was made in connection with determination that the evidence supported findings.*

2. *If claim of conflict is based on use of word sufficiently then contention must be that local law requires perfect performance.*

3. *At time lessors were requested to perform agreement to extend lessee had perfectly performed.*

4. *Code sections require performance of conditions precedent but do not define what constitutes performance of condition of faithful compliance.*

5. *Decisions cited by petitioners do not involve question of performance, facts so dissimilar that statements of law have no application.*

6. *Acceptance of royalties after default waives all prior defaults of any kind.*

B. REFERENCE TO SECTION 3275, CAL. C. C., NOT IN CONFLICT WITH LOCAL LAW.

1. *Decisions cited by petitioners do not hold that in a case like the instant case Section 3275 may not be considered and its equitable principles applied.*

2. *In California an agreement to renew creates a vested interest in the land in the lessee.*

3. *California decisions definitely recognize that relief may be granted in equity even where time is of the essence.*

4. *California decisions hold that relief may be granted under Section 3275 in cases involving conditions either subsequent or precedent.*

I.

GENERAL STATEMENTS APPLICABLE TO ALL REASONS ADVANCED BY PETITIONERS FOR ISSUANCE OF WRIT.

In all cases of claimed conflict either between different circuits or with decisions of state courts, "the general language of the opinions must be read in connection with the facts." *White v. Aronson,* 302 U. S. 16, 21, 58 S. Ct. 95.

In each instance of claimed conflict with decisions of other circuits or decisions of the highest courts of California, the petitioners have taken a sentence or a portion of a sentence out of the decision in this case and compared it with an equally isolated statement from the decision claimed to be in conflict. In every instance, when the facts of the instant case and the facts of the case with which it is claimed there is a conflict are considered, any appearance of conflict disappears.

II.

RESPONSE TO PETITIONERS' POINT A AND D.

Under point A, petitioners contend that the decision in the instant case holding that the rejection provisions of section 70b Bankr. Act are inconsistent with and inapplicable to Chapter X proceedings is in conflict with the decision from the 8th Circuit; and under point D, contend that the decision in the above-mentioned respect by the Court in the instant case involves an important question of federal law which should be settled by this Court. Because the two points are so closely related, respondent groups them for discussion.

A. Decision That the Rejection Provisions of Section 70b Are Inapplicable to Chapter X Proceedings Is Not in Conflict With a Decision From the Eighth Circuit.

The decision in the case of *Wiemeyer v. Koch*[1] by the Eighth Circuit is not in conflict with the holding in the instant case that: "the assumption, rejection and automatic rejection provisions of Sec. 70b are inconsistent with and inapplicable to Chapter X reorganization proceedings."

1. Inconsistency Between Rejection Provisions of 70b and Provisions of Ch. X Not Considered in Wiemeyer Decision.

In the *Wiemeyer* case the attention of the Circuit Court of Appeals was not called to the provisions of Chapter X which are in conflict with and inconsistent with the provisions of Sec. 70b relating to the assumption and rejection of executory contracts including leases.

Section 102 of the Bankruptcy Act[2] expressly excludes from application to reorganization proceedings all provisions of Chapters I to VII which are in conflict or inconsistent with provisions of Chapter X.[3] Section 70b is a part of Chapter VII.

The legal question decided by the above quoted statement of the Circuit Court in the instant case was the con-

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[1]152 F. (2d) 230.

[2]11 U. S. C. 502.

[3]"The provisions of chapters I to VII, inclusive, of this Act shall, *in so far as they are not inconsistent or in conflict with* the provisions of this chapter, apply in proceedings under this chapter:" (Emphasis added.) Sec. 102, Chapter X, Bankr. Act, 11 U. S. C. 502.

flict and inconsistency between the provisions of Chapter X and the provisions of Sec. 70b as applicable to the assumption or rejection of leases. That legal question was not touched upon in the *Wiemeyer* case. Therefore there is not that conflict in decisions on a question of law which requires the conflict to be settled by this Court.

2. Statement of Law in Wiemeyer Case Dictum.

A summary of the facts in the *Wiemeyer* case will disclose that the statement of law relied upon by petitioners as conflicting with the decision in the instant case was not necessary to the decision and is only dictum.

The lease involved in the *Wiemeyer* case provided it should terminate in the event of insolvency, assignment for the benefit of creditors, the appointment of a receiver, adjudication in bankruptcy or default in the payment of rental.[4]

The landowners, Wiemeyers, filed numerous petitions in the reorganization proceedings seeking an order restoring them to possession and cancelling the lease.[5]

One of these petitions was finally granted, the lease was cancelled and the landowners restored to possession.[6]

After the cancellation of the lease, the landowners filed a claim for unpaid rental. It was the decision of the District Court on that claim from which the appeal was taken.

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[4]*Wiemeyer v. Koch*, 152 F. (2d) 230, see last par. 231, *et seq.*

[5]See p. 232, 2d col.—233 of decision.

[6]See p. 233, 1st Col. of decision.

The issue of assumption or rejection of the lease was only incidentally involved, and was not necessary to the determination of the case.

The decision cancelling the lease and restoring the landowners to possession was a rejection **by the Court** of the lease. That rejection related back to the date of the approval of the petition. On that ground alone the landlord was only entitled to the reasonable value of the use and occupation of the premises.

3. No Supporting Authority to Statement of Law in Wiemeyer Case.

The statement in the *Wiemeyer* decision relied upon by petitioners is as follows:

> "The statutory presumption of rejection by non-action within the period of sixty days is a conclusive statutory presumption."

The only authority cited in the *Wiemeyer* decision for that statement is Collier on Bankruptcy, 14 Ed. Sec. 70.43, p. 1230.

At the cited place in that treatise the author is dealing solely with straight bankruptcy. But in a footnote on page 1233, the author calls attention to the distinction in reorganization proceedings.[7]

At another point in the treatise, the author distinctly states that the provisions respecting assumption or rejection of executory contracts and leases as contained in Sec. 70b of the Bankruptcy Act, does not apply to proceedings under Chapter X, because it is inconsistent therewith and refers to Secs. 102, 116(1), 202 and 216(4).[8]

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[7]Collier on Bankr., 14th Ed., Vol. 4, page 1233, note 30.
[8]Collier on Bankr., 14th Ed., Vol. 7, page 605.

No Important Question of Federal Law Involved in Decision That Chapter X Inconsistent With Rejection Provisions of 70b.

The question of the conflict or inconsistency between the provisions of Chapter X of the Bankruptcy Act and the provisions of section 70b of that Act respecting assumption or rejection of executory contracts does not involve an important question of federal law which should be settled by this Court.

1. Inconsistency too Apparent to Require Interpretation.

A brief review of the respective provisions of the two portions of the act will disclose that no interpretation is necessary to determine the conflict and inconsistency.

Sec. 70b vests in the *trustee* the power to reject an executory contract including an unexpired lease by affirmative act or by failing to act within sixty days.[1]

Section 116(1) of Chapter X of the Bankruptcy Act provides that the *judge may permit* the rejection of executory contracts *upon notice to the parties to the contract and other interested parties.*[2]

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[1]"Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: Providing, however, that the court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or qualified, shall be deemed to be rejected." (The pertinent portion of Sec. 70b, 11 U. S. C. A. 110b.)

[2]"Upon the approval of a petition, the judge may * * * permit the rejection of executory contracts of the debtor, except contract in public authority, upon notice to the parties to such contract and to such other parties in interest as the judge may designate." (Bankr. Act, Sec. 116(1); 11 U. S. C. A. 516 (1)).

By definition in Chapter X the term executory contracts includes unexpired leases on real property.[3]

A provision that the *judge may permit* a rejection is certainly inconsistent with a provision that the trustee may reject either by action or non action.

The provision that the judge may permit rejection upon notice to the parties to the contract and other interested persons is certainly inconsistent with a provision that the trustee may reject without notice to anyone.

Further, Congress by the use of the word "judge," precluded the referee from granting such permission. By definition the act provides that "Court" shall mean the judge or the referee,[4] but "judge" shall mean judge of a court of bankruptcy, not including the referee.[5]

Section 216(4), Chapter X of the Bankruptcy Act is equally inconsistent with the provisions of section 70b which are under discussion.

Section 216(4) provides, with an exception not here pertinent, that a plan of reorganization may provide for the rejection of any executory contract.[6]

Since a plan of reorganization must be approved by the judge[7] and confirmed by a majority of the stockhold-

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[3]Sec. 106(7), Bankr. Act; U. S. C. A. 506(7).

[4]Sec. 1(9), Bankr. Act; 11 U. S. C. A. 1(9).

[5]Sec. 1 (20), Bankr. Act; 11 U. S. C. A. 1(20).

[6]"A plan of reorganization under this chapter * * * (4) may provide for rejection of any executory contract except contracts in public authority." Sec. 216(4), Bankr. Act; 11 U. S. C. A. 616(4).

[7]Sec. 174, Bankr. Act; 11 U. S. C. A. 574.

ers[8] and two-third of the creditors[9] a right of rejection vested in the trustee could deprive the judge, the stockholders and the creditors from passing on the question of rejection.

If the provisions of section 70b of the Bankruptcy Act, respecting rejection of leases applied to reorganization proceedings an absurd condition would be created by the provisions of section 202, Chapter X of that act. The last mentioned section provides in substance that if "an executory contract shall be rejected pursuant to the provisions of a plan, or to the permission of the court given in a proceeding under this chapter, or shall have been rejected by a trustee or receiver in bankruptcy or a receiver in equity under a prior pending proceeding" any person injured, including a landlord, by the rejection, shall have a provable claim.[10] No place in the section is there any provision for a claim for damage by a landlord whose lease was rejected by a *trustee in the reorganization proceeding*, whether the rejection was brought about by affirmative act or automatically by lapse of time.

2. Where Inconsistency Considered All Decisions Are in Accord With Decision in Instant Case.

All decisions of federal courts, in which the conflict and inconsistency between the provisions under discussion of Sec. 70b and the provisions governing rejection of executory contracts in reorganization proceedings under Chapter X, is in question uniformly hold that the rejec-

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[8]Sec. 179, Bankr. Act, 11 U. S. C. A. 579.

[9]Sec. 179, Bankr. Act; 11 U. S. C. A. 579.

[10]Sec. 202, Bankr. Act; 11 U. S. C. A. 602.

tion provisions of Sec. 70b have no application to reorganization proceedings.

Some of the cases arose under 77B of the Bankruptcy Act prior to the amendment of 1938, but the provisions of 77B having to do with rejection of executory contracts were counterparts of the present provisions of Chapter X.[11]

The Court in *In re Cheney Bros.*, 12 F. Supp. 605 (D. C. Conn. 1935) holds that under the provisions of 77B the sole power to reject leases is vested in the judge.

The opinion written by Judge Conger of the Southern District of New York in the case of *In re Childs,* 64 F. Supp. 282 contains a most excellent analytical discussion of the conflicting sections and concludes with the determination that the rejection provisions of section 70b do not apply to reorganization under Chapter X.

In the opinion in the case of *Consolidated Gas, Electric Light and Power Co. of Baltimore v. United Railways and Electric Co. of Baltimore,* 85 F. (2d) 799, 805 (Second Circuit) it is stated:

> "In this connection, the distinction between the ordinary proceedings in bankruptcy and a proceeding under 77B (11 U. S. C. A., sec. 207) for corporate reorganization is significant. Bankruptcy contemplates the sale of the bankrupt's property and a distribution of the proceeds to the creditor; and the intervention of bankruptcy constitutes a breach

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[11]Sec. 116(1), Bankr. Act; 11 U. S. C. 516, *id.* prior to Amend. 77B (c5); 11 U. S. C. 207 (c5).

Sec. 216(4), Bankr. Act; 11 U. S. C. 616, *id.* prior to Amend. 77B (b6); 11 U. S. C. 207 (b6).

Sec. 202, Bankr. Act; 11 U. S. C. 602, *id.* prior to Amend. 77B (810; 11 U. S. C. 207 (b10).

of an executory contract, if the trustee does not elect to assume its performance, and gives rise to a proveable claim. Central Trust Co. v. Chicago Auditorium Ass'n., *supra.*" (240 U. S. 581, 36 S. Ct. 412, 60 L. Ed. 811.)

"Section 77B on the other hand, does not contemplate the surrender and sale of the debtors assets, but rather the transfer of the property, including executory contracts and leasehold estates not affirmatively rejected, to a reorganized body for the continuance of the business. An executory contract, therefore, remains in force in a proceeding under section 77B until it is rejected. It passes with the other property of the debtor to the reorganized corporation."

Considerable weight is added to the respondent's contention in this regard by the amendment ordered by this Court of its opinion in the case of *Finn v. Meighan,* 325 U. S. 300, 89 L. Ed. 1624.

The lease involved in that case expressly provided that it should terminate in the event of the lessee's bankruptcy or insolvency. Section 70b provides that such a forfeiture covenant is enforceable in bankruptcy and this Court held the provision applicable in Chapter X proceedings.

The original opinion, however, read: "But Congress has made section 70 applicable to reorganization proceedings under ch. X."[12] But on June 11 by order of Court[13] that sentence of the opinion was amended to read: "But Congress has made the *forfeiture provisions* of section 70 applicable to the reorganization proceedings under ch. X."

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[12]See 5 C. C. H. Sup. Ct. Serv. (1944-45), 1467, 1468.
[13]325 U. S. 840.

In footnote 2 to the opinion in that case it is stated: "As respects the rejection or assumption of leases under c. X see Secs. 116(1), 202, 216(4) . . . cf. Re Chase Commissary Corp. (D. C.) 11 F. Supp. 288." These are the identical sections to which attention has been directed in this response.

III.

RESPONSE TO PETITIONERS' POINTS B, C AND E.

The reasons advanced by petitioners under Points B, C and E all relate to contentions of petitioners that statements made in the opinion of the Circuit Court in passing on the question of the assumption of the lease by the trustee were in conflict with other decisions or raised an important question of federal law.

A. Decision in Respect to Assumption of Lease by Trustee Not in Conflict With the Walker or Wiemeyer Decisions.

The conclusion of the Circuit Court that the trustee had assumed the lease was not based only on the operation of the mine and the payment of royalties as inferred by petitioners under their Point B. The facts and circumstances considered by the Court are set forth in the opinion [R. 1413-1416].

The decision in the instant case that *all* the facts and circumstances showed an assumption of the lease is not, as argued by petitioners, in conflict with either *In re Walker*[1] or *Wiemeyer v. Koch*.[2]

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[1]93 F. (2d) 281 (2d Cir.).

[2]152 F. (2d) 230 (8th Cir.).

1. Question of Assumption Not an Issue in Walker Case.

The *Walker* case rose out of a proceeding in the bankruptcy court, brought by the landlord to require the debtor, who had been continued in possession, to surrender possession or for an order lifting the injunction against an eviction.

The basis of the claim of the landlord was a provision of the lease giving a right of reentry in the event of bankruptcy, insolvency or the appointment of a receiver.

The issue was whether acceptance by the landlord of payments from the trustee would toll the right of reentry.

The Court held that simply accepting such payments would not toll the right of reentry unless they were accepted as rent under the lease. If accepted as rent under the lease, the right of reentry would be tolled.

There was no issue of assumption or rejection of the lease involved in the *Walker* case.

2. Statement in Walker Case That Court Must Order Assumption of Lease Not in Accordance With Bankruptcy Act.

The statement in the decision as quoted by petitioners,

> "That such debtor" (debtor continued in possession) "does not pay as lessee; it may not do so, it is forbidden to affirm a lease without order of the Court,"

was not necessary to the decision and is not supported by any authority or provision of the Bankruptcy Act. Under Chapter X, and the same was true under section 77B, there is no provision respecting assumption of a lease, certainly no provision requiring an order of the Court.

Section 70a vests the title to all property of the debtor, with some exceptions not here pertinent, in the trustee. Executory contracts and leases are not among the exceptions.

The only provisions applicable to Chapter X proceedings respecting such leases and contracts is the power given to the "judge" to reject them after notice to interested parties,[3] or in the plan of reorganization.[4]

3. In Instant Case District Court Did Order Assumption of Lease.

However, even if the quoted statement from the *Walker* case correctly states the law, it is not in conflict with instant decision. In the instant case, there were orders of the District Court directing the affirmance of the lease.

On June 29th, 1939, the debtor, then continued in possession by order of Court, was directed to continue in possession of the mine under the terms of the lease, and to pay the royalties subject to the control of the Court by further orders. [R. bot. pp. 17-18.]

No further orders were made in this respect except the following:

On August 11th, 1939, Hart was appointed trustee and all assets of the debtor were ordered to be turned over to him. [R. 25.] The operation of the Mt. Gaines mine was the only business of the debtor. [R. par. IV, p. 3.]

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[3]Bankr. Act, Sec. 116(1); 11 U. S. C. 416(1).

[4]Bankr. Act, Sec. 216(4); 11 U. S. C. 616(4).

On November 24th, 1943, the trustee petitioned the District Court for authorization to make application for an extension of the lease stating:

> "The said lease and option to purchase are the sole assets of the 'debtor' and is a valuable asset and it is to the best interests of the creditors and stockholders . . . that said written application be made for the extension of said lease . . . under the same terms and conditions as the present existing lease and option." [R. 967.]

On Dec. 2, 1943, the District Court Judge made an order granting such petition directing that

> "the trustee . . . immediately file his written application and make demand for the extension of the 'lease' under the same terms and conditions." [R. 972.]

The right to the extension is embodied in the lease. While the order of Dec. 2, 1943 does not use the words "adopt" or "asume" it would be sacrificing substance to form to say that it did not constitute an order for adoption.

Even if there had been no adoption or assumption of the lease prior to the order of Dec. 2, 1943, that order would relate back to the filing of the petition in reorganization.

4. Wiemeyer Case Involved Claim of Lessor for Rental at Rate Provided in Lease.

The *Wiemeyer* case[5] arose out of a proceeding in the bankruptcy court by the landlord to recover unpaid rent

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[5]*Wiemeyer v. Koch*, 152 F. (2d) 230.

at the rate provided in the lease. The petition or claim of the landlord was not filed until after the lease had been cancelled on petition of the landlord. (See this Response, p. 13.)

So far as the effect of payments to the landlord, ordered by the Court, and paid by the trustee, is concerned, the decision holds that they would be presumed to be payments for the use and occupation, and not payments under the terms of the lease.

But the decision clearly recognizes that there might be circumstances which would show they were paid under the terms of the lease. If so, the Court held, such payment would constitute a recognition that the lease was assumed or in effect.

For a more complete discussion of the *Wiemeyer* case, see this Response, p. 13.

5. Mining Lease Not Burdensome to Lessee.

In the instant case, the Court determined from the facts, some of which are discussed in the opinion [R, 1412-1416], that the lease had been assumed.

The ordinary mining lease such as the one here involved cannot be said to be burdensome to the lessee because it provides for no fixed rental.[6] The only liability of the lessee is the payment of royalties dependent on production. It is not rental for use and occupation of the premises, but is compensation for the right to remove a portion of the substance of the land.

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[6]R. 37-43.

6. There Can be no Presumption That Payments of Royalties Are Payments for Reasonable Value of Use of Premises.

In the ordinary leases such as those involved in the *Walker* case and the *Wiemeyer* case, there are fixed monthly payments. As stated in those decisions, the payments that were made, even though in the amounts provided in the lease, would be presumed to be payment for the reasonable value of the use and occupation.

Such presumption could not be applied in the instant case because the amount paid each month greatly varied and was determined by production as shown by reports accompanying each payment.

From the time of the appointment of the trustee in August, 1939, to the termination of the first term of the lease, Dec. 15, 1943, prompt royalty payments were made and each payment was accompanied by a statement and a copy of the smelter returns which would show exactly how the trustee arrived at the amount of the payment. [R. top 996 and top 998.]

Since the value of the use and occupation of the mining property would be practically nil, its only value to the occupant being the right to remove minerals, the presumption mentioned in the *Wiemeyer* case[7] that payments to the lessor were for reasonable value of use and occupation could not apply in the instant case.

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[7]152 F. (2d) 230.

7. There Is no Admission in the Pleadings That Trustee Had Not Assumed the Lease.

On pages 20 and 21 of petition, there are references to statements made in the application of the trustee for an order authorizing him to procure an extension. In the application, the lease is referred to as an asset of the Mount Gaines Mining Company. Respondent assumes these references are made in an attempt to show that the trustee admitted he had not assumed the lease. This seems to be grasping at straws; there was no question about who was asking for the extension, or who was petitioning the Court. In reorganization proceedings the debtor continues to own the beneficial interest in the assets, but the trustee holds the legal title and it is his duty to protect the assets.

B. Statement in Decision Regarding Recognition of Operation of Mine by Trustee Not in Conflict With Model Dairy Co. Decision.

Petitioners contend in their petition, Point C, the statement in the decision of the Circuit Court of Appeals that:

> "It would seem that lessors, by reason of their recognition of the operation of the mine by Hart, as trustee, and acceptance of the benefits resulting from such operation are in no position to question his assumption of the lease."

is in conflict with the decision of Circuit Court of Appeals for the Second Circuit in the case of *Model Dairy Co. v. Foltis-Fischer, Inc.*[1]

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[1]67 F. (2d) 604.

1. Model Dairy Case Is Not a Proceeding Under Any Part of Bankruptcy Act.

The above quotation is a sentence lifted out of the opinion of the Circuit Court and is only a part of the reasons assigned.[2]

However, the statement even taken by itself is not in conflict with the cited decision.

The *Model Dairy Co.* case was not a proceeding in bankruptcy or reorganization. On petition of a single creditor, a receiver was appointed.

The lease contained a provision for re-entry in the event of the appointment of a receiver.

The Court held that the word "receiver" as used in the lease, "includes a receiver appointed in such a suit as this before us, though he does not take title. No receiver does, except when some statute so provides."[3]

The portion of the opinion quoted by petitioners is in connection with a question of the waiver by the landlord of his right of re-entry. It has no connection with the affirmance or rejection of a lease. However, in its opinion, the Court did state:

> "Though delay as such is immaterial, if the lessor elects not to re-enter his decision is final; it will be inferred from the receipt of rent accruing after the breach, or from any other recognition of the continuance of the term."[4]

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[2]See decision, R. pp. 1413-1416.

[3]67 F. (2d) 704, 706 (1, 2).

[4]67 F. (2d) 704, 706 (5, 7).

C. Circuit Court's Decision That Trustee Had Assumed Lease Does Not Raise an Important Question of Law.

Under Point E petitioners recite certain facts, which by no means include all the facts, and then contend the decision of the Circuit Court that the trustee had assumed the lease raises an important question of federal law necessary to be settled by this Court. They cite the *Wiemeyer*[1] case as illustrative of the importance of the question.

1. Even Wiemeyer Decision Recognizes That Assumption May be Evidenced by Acts.

Even if an assumption of a lease by the trustee in reorganization proceedings is necessary, unless that assumption can only be accomplished or evidenced by formal written declaration, the question is one of fact in each particular case.

While the *Wiemeyer* case does hold that payments by the trustee to the lessor will be presumed to be payments for use and occupation, and therefore, create no presumption of assumption of the lease, in the decision the Court discusses the facts to determine whether the presumption had been overcome.

The *Wiemeyer* case has been discussed at length in this response (p. 13 and p. 23).

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[1]*Wiemeyer v. Koch,* 152 F. (2d) 230.

IV.

RESPONSE TO PETITIONERS' POINTS F, G.

The reasons set forth by petitioners under their points F and G as to why they claim the writ should issue all relate to the conclusion of the Circuit Court that the evidence sustained the District Court's findings that there had been "faithful compliance" with the covenants of the lease during the first term.

A. Statement by the Circuit Court That There Had Been Sufficient Compliance With Conditions Precedent Is Not in Conflict With California Law.

Petitioners argue, under Point F, that the statement by the Circuit Court of Appeals that respondent had "sufficiently complied with the conditions precedent" is in conflict with California law.

1. Quoted Statement of C. C. A. Was Made in Connection With Determination That the Evidence Supported Findings.

The quotation is a portion of a sentence out of one paragraph of the opinion. A reading of the portion of the decision in which this paragraph appears discloses that the Court is discussing the sufficiency of the evidence to support a finding of faithful performance. This discussion commences with the statement: "The trial court found no deviation from faithful performance . . ." [R. top p. 1431] and continues to the phrase quoted by petitioners. [R. 1432.]

Petitioners do not point out just wherein they claim there is a conflict with California law. Because of the code sections and some of the decisions cited by petitioners there is an indication that their view is that the quoted statement is a holding that the performance of conditions precedent is not required. Of course that is not a correct construction of the statement. The Circuit Court did not hold that the performance of a condition precedent was unnecessary. The Court decided that the condition precedent in this case was "faithful compliance" with the terms of the lease. The Court then decided that the evidence was sufficient to support a finding by the trial court of faithful compliance. As pointed out it is that portion of the opinion that contains the quoted phrase.

The District Court found specifically that all royalties had been paid except $93.19 [R. 127] and the Court ordered that amount paid. The Court further found that "lessee has complied with all the laws of the State of California and has conducted their operations in accordance with the laws and mining and milling regulations of the State of California." [R. Finding, p. 129.] The Court generally found, that "the lessee has faithfully complied with all the agreements and covenants contained in said agreement of lease and option to purchase. That all the conditions precedent to be performed or to have occurred have been performed or have occurred." [R. Finding X, p. 129] and "that any deviation from strict compliance was the result of unintentional errors or constructions with respect to the lease." [R. Finding XII, p. 130.]

Respondent does not concede that the recitation of alleged defaults as contained in petitioners' statement of

facts or as set forth in the dissenting opinion present a true picture. The picture takes on an entirely different aspect when viewed in the light of other evidence, explaining, showing the acquiescence of lessors, the character of the defaults, the efficient safe operation of the mine, the length of the period of performance, ten years, the constant work and acts necessary to be performed, the accomplishments of the lessee and the benefits to the lessor. But respondent does not deem it necessary or proper to discuss the evidence with respect to its sufficiency because such discussion has no place in connection with a petition for a writ of certiorari.

2. If Claim of Conflict Is Based on Use of Word Sufficiently Then Contention Must be That Local Law Requires Perfect Performance.

Since petitioners under this point of their petition quote the phrase "sufficiently complied with conditions precedent" as being in conflict with California law it may be their contention that it is the use of the word "sufficiently" which gives rise to the conflict. That is, that under California law, there is no such thing as sufficient compliance to fulfill a requirement of faithful compliance.

In that event it would follow that petitioners contend there must have been full, exact, prompt and perfect performance over a full period of ten years to constitute "faithful compliance" under California law. If they should concede that a slight deviation from such perfect compliance would not, under California law, constitute a breach of a condition of faithful compliance, the question immediately would become one of degree and would have to be decided under the facts of each case. It would then be a question of fact.

3. At Time Lessors Were Requested to Perform Agreement to Extend Lessee Had Perfectly Performed.

Before reviewing the code sections and decisions cited by petitioners with respect to any requirement of perfect performance to comply with faithful compliance under the circumstances in this case, there is another factor it is well to have in mind. The underpayments of royalties mentioned in the instant case were underpayments at that time, or delays in payment. All royalties were paid before the end of the first term, except $93.19 to which the rule of deminimus was applied. The failure to strictly comply with the regulations of the Industrial Accident Commission were temporary. All such failures were promptly corrected. So that there had been complete performance at the time that the lessor was called upon to perform the agreement to extend the lease.

4. Code Sections Require Performance of Conditions Precedent but Do Not Define What Constitutes Performance of Condition of Faithful Compliance.

The California code sections cited by petitioners do not conflict with the quoted statement in the instant case.

Section 1439 Code of Civ. Proc., defines conditions precedent.

Under this defintion the requirement of faithful compliance was, as construed by the Circuit Court, a condition precedent to the right of an extension.

Section 1439 Code of Civ. Proc., provides that all conditions precedent must be fulfilled before the other party can be required to perform.

The trial court found that the lessee had faithfully complied with the terms of the lease and the Circuit Court held that the evidence supported that finding.

There is nothing in either of the cited sections that defines faithful compliance or that requires perfect performance to constitute faithful compliance.

5. **Decisions Cited by Petitioners Do Not Involve Question of Performance, Facts so Dissimiliar That Statements of Law Have No Application.**

A review of the decisions cited by petitioners discloses that none of them defines faithful compliance, none of them hold that what constitutes performance is not a question of fact and none of them hold that where there are deviations from perfect performance which are corrected and the benefits accepted by the other party before such other party is required to perform that such deviations constitute a breach of condition.

Some of the cases cited by petitioners involve options to purchase in nowise connected with a lease; as for example, the case of *Bourdiere v. Baker*.[1] In this case, the owner gave an option to purchase certain property for the total price of $25,000. The consideration paid for the option was $10. The option required the optionee to pay $25,000 on or before a certain date. This the optionee failed to do, and the optionor refused to accept belated or conditional performance.

The *Berhman v. Barto* case,[2] cited by petitioners did involve a claim of right to extension of a lease. The tenant

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[1] 6 Cal. App. (2d) 150, 44 Pac. (2d) 587.
[2] 54 Cal. 131, 70 A. L. R. 1219.

had failed to pay the last quarterly rent and had permitted a judgment for taxes to be entered against the property. The only determination of the Court was that by holding over after the term, the tenant had not created an extension. The defaults had not been cured.

The case of *Mariposa Construction Company v. Peters*[3] involved an option to purchase contained in a lease. The lessee was in default in the payment of rental at the time he gave the notice, and he never at any time paid or tendered the payment of the purchase price.

The case of *Caldwell v. Delaray Mines Inc.*[4] was a mere option to purchase mining property which provided for the payment of $2,000 upon the exercise of the option, and $300 per month until total purchase price of $100,000 was paid. Only $450 was paid on account of the $2,000. Nothing more was accepted by the optionor, or tendered by the optionee.

The case of *Rusconi v. California Fruit Exchange*[5] cited by petitioners did not involve a lease and there was a gross default, which was not cured before performance by the other party was demanded.

The case of *De La Flasie v. Graumont-Butioli Corporation*[6] cited by petitioners, involved a contract of employment and simply holds that plaintiff was entitled to recover damages for breach of the contract of employment. Performances by plaintiff was exercised on the ground that she had not been given the notice required.

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[3]215 Cal. 134, 8 P. (2d) 847.
[4]68 Cal. App. (2d) 180, 156 P. (2d) 52.
[5]100 Cal. App. 750, 281 Pac. 84.
[6]39 Cal. App. (2d) 461, 103 P. (2d) 447.

The case of *Swift v. Occidental Mining Company*[7] cited by petitioners, and much relied upon by them, arose out of a provision for an extension of an oil lease. The decision involved only the question of the sufficiency of the evidence to sustain the findings. It involved no issue of what constituted "faithful compliance" or what justified relief in equity. The default of lessee was not cured.

The trial court in that action found that the defendant, lessee, had complied with all of the covenants and conditions of the lease. The only issue considered by the Supreme Court was the sufficiency of the evidence to sustain such a finding. The lease required commencement of work within three months from the date of the lease and required continuous work in prosecuting the development of the lease to the end that it might be made productive of petroleum products. It further provided that any discontinuance of work for four months would terminate the lease.[8]

The Supreme Court held that the uncontradicted evidence showed there had been complete cessation of work on the lease for two periods of time; the first, for the period of eighteen months and, the second, for the period of ten months, and that no production had been developed on the property.[9] The Supreme Court reversed the decision of the trial court on the ground of insufficiency of evidence to sustain the finding.

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[7]141 Cal. 161, 74 Pac. 700.
[8]141 Cal. 161, 169, 74 Pac. 700, 702.
[9]141 Cal. 161, 170, 74 Pac. 700, 703, 2d col.

That statement quoted by petitioners was unquestionably purely dictum. The issue was, as stated, insufficiency of the evidence.

Even the language used in the *Swift* case and quoted by petitioners when given the only construction to which it is reasonably susceptible is not applicable to the instant case.

The Court in the *Swift* case said:

> "We are not sure that the respondent means to contend that the failure of appellants *to insist upon forfeiture* of the lease for waste or breach of covenant, precludes them from refusing to grant another term . . . The waiver of the forfeiture is one thing; the renewal of the lease is quite another. The *neglect of the landlord to strictly enforce his right of forfeiture* for breach of condition does not entitle the tenant to a renewal when such renewal is dependent upon faithful performance of conditions." (Emphasis added.)

The two phases, that are emphasized, clearly indicate that this statement of the Court simply means that because the lease was not cancelled by the landlord for the default during the first term does not preclude him from denying an extension.

The word *waiver* in the phrase, "The waiver of the forfeiture is one thing," must be construed to mean only the failure to declare a forfeiture. So far as appears from the opinion there was no waiver, in the sense of an agreement, or actions by the lessor which would have

precluded him from declaring a forfeiture and cancelling the lease.

The nature of the default in the *Swift* case was such that it could not be cured.

The total cessation of operations for approximately two and a half years could not be cured by later performance. The time that was passed could not be relived.

Equity could not have given relief from such a default. There could be no question about it being a wilful default. Also, there would be no possible way of measuring the damages suffered by the lessor because no evidence could be produced showing what production might have been secured from development operations during the periods of cessation of activities.

There was no contention that such default during the first term had been cured or had been waived in any manner.

6. Acceptance of Royalties After Default Waives All Prior Defaults of Any Kind.

In the instant case, any defaults by delays in the payment of royalties were cured by the subsequent payment thereof. Furthermore, *all* claimed defaults were waived by the lessor continuing to accept royalties after the defaults occurred. The evidence shows that there were no defaults in the prompt payment of royalties after the trustee took charge in August of 1939. [R. 996.] All failures to comply with regulations of the Industrial Accident Commission were corrected long before the expiration of the term.

Royalties were paid by the trustee and were accepted by the lessors from the trustee's appointment, August, 1939, until the end of the first ten-year period, December 15th, 1943. [R. 996.] All royalty payments were accompanied by copies of the smelter returns. [R. 998.]

Under California law, the acceptance of rent or royalties constitutes a complete waiver of *all* defaults that occurred prior to the payment and acceptance of the rent or royalties.

The case of *Kern Sunset Oil Co. v. Good Roads Oil Co.,* 214 Cal. 435, 440, 6 P. (2d) 71, 2d col. 73, was an action to declare a forfeiture of an oil lease on the ground that the drilling requirements as contained in the lease had not been complied with. The landlord, however, had continued to accept royalties from some producing wells that were on the leased property. The Court held:

> "The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general rule and is supported by ample authority." (Citing numerous cases.)

The Court further states that the acceptance by a landlord of rents is an affirmation by him that the contract is still in force, "and he is thereby *estopped from setting up a breach in any of the conditions of the lease,* and demanding a forfeiture thereof." (Emphasis added.)

B. The Reference to Section 3275 C. C. of California Not in Conflict With Local Law.

Under petitioners' Point G it is contended that any application of section 3275 of the Civil Code of California to this case is a decision of an important question of local law in conflict with applicable local decisions.

The above named section does not form the basis of the decision of the Circuit Court. The Court says: "Our conclusion in this regard is strengthened by section 3275 in the California Civil Code."[1]

1. Decisions Cited by Petitioners Do Not Hold That in a Case Like the Instant Case Section 3275 May Not be Considered and Its Equitable Principles Applied.

Under this point, petitioners cite several decisions which do not sustain their contention.

The case of *Briles v. Baulson*[2] cited by petitioners involved an option. The optionee did not comply with his agreement within the time limited and upon the elapse of the time the optionor gave notice that the option was cancelled. Nowhere in the decision is section 3275 mentioned.

The case of *Wightman v. Hall*[3] cited by petitioners, also cited in the dissenting opinion, arose out of an op-

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[1]"Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty."

[2]170 Cal. 196, 149 Pac. 169.

[3]62 Cal. App. 632, 217 Pac. 580.

tion to purchase property. The price fixed in the option was not paid within the time limited and when it was tendered approximately one month later, the tender was refused. Section 3275 is not mentioned in the decision.

In the case of *Leslie v. Federal Finance Company, Inc.*,[4] cited by petitioners and also cited in the dissenting opinion, a stipulation and interlocutory decree was entered into which gave to the plaintiff in effect an option to purchase a parcel of property that had been formerly owned by the plaintiff. It provided for the unconditioned payment of a fixed price on or before a certain date. The stipulation and decree very definitely provided that the money must be paid not later than the day named. The plaintiff in that case defaulted; nevertheless, the Court relieved the plaintiff of the default.

The court in the *Leslie* case quoted from section 3369, Cal. Civ. Code[5] and quotes section 3275, Cal. Civ. Code[6] and in connection therewith states: "These sections have been applied in numerous cases."[7]

Later in the decision it is stated: "it is true that time is of the essence of the ordinary option contract and no forfeiture results from a strict enforcement of its terms because *an option is merely an offer* to sell and *vests no estate in the property* to be sold." (Emphasis added.) However, the court held it was not a case of a strictly option contract and granted relief from forfeiture by virtue of the provisions of section 3275, Cal. Civ. Code.

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[4]14 Cal. (2d) 73, 92 P. (2d) 910.

[5]"Neither specific nor preventative relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law—."

[6]See Note 1.

[7]14 Cal. (2d) 73, 79, 92 P. (2d) 906, 909(1).

2. In California an Agreement to Renew Creates a Vested Interest in the Land in the Lessee.

The Supreme Court of California has definitely decided that an agreement contained in a lease for an extension or renewal *does vest an estate or interest in the property in the lessee.*[8] Since, as the Supreme Court said, "the right of renewal constitutes a part of the tenant's interest in the land," its loss by reason of a default would constitute a "forfeiture or a loss in the nature of a forfeiture," and therefore, neither could it be said to be an *ordinary option.*

The case of *Henck v. Lake Hemet Water Company*[9] cited by petitioners, involved a water contract whereby the defendant agreed to furnish water to the plaintiff on payment of an annual sum of money. The contract made the payment of money a condition precedent to the right to receive water. The plaintiff defaulted in the payment of one annual installment and the defendant upon such default terminated the contract as provided therein. In the decision, sections 1492 and 3275 of the Civil Code of California are quoted and the court states:

> "The provisions of section 3275 are necessarily qualified by the language of section 1492, so that *generally* in a case where time is made the essence

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[8]"The interpretation of this section (1462, Civil Code), brings the covenant directly within the meaning of the statute, because obviously a covenant for a renewal of a lease is for the direct benefit of the estate granted. In Taylor on Landlord and Tenant the rule is thus stated at section 262: 'The right of renewal constitutes a part of the tenant's interest in the land, and so a covenant to renew is binding upon the assignee of the reversion.'"

Standard Oil Co. v. Slye, 164 Cal. 435, 442, 129 Pac. 589, 591, 2d col.

[9]9 Cal. (2d) 136, 69 P. (2d) 849.

of the agreement a party may not obtain relief under that section. (Collins v. Eksoozian, 61 Cal. App. 184 (214 Pac. 670).) In the cited case, however, *relief was granted on the ground that even though time was an essential element that showing justified the interposition of a court of equity.*" (Emphasis added.)

3. California Decisions Definitely Recognize That Relief May be Granted in Equity Even Where Time Is of the Essence.

In the *Henck* case, from which the above quotation is taken, as in the *Collins* case cited in the quotation, the Court determined that even though time was an essential element the showing justified the interposition of a court of equity and granted relief from the default.

The case of *Crowell v. City of Riverside,* 26 Cal. App. (2d) 566, 581, not cited by petitioners but cited in the dissenting opinion, involved a breach of a condition in a lease against subletting. In its decision, the Court quotes several passages from McAdam on Landlord and Tenant as to the general rules of equity in such cases and then quotes section 3275 of the Civil Code of California. The Court did not hold that section 3275 was inapplicable. In fact it applied the section but held that the execution of a sublease *was a deliberate, voluntary* and *intentional act* and consequently it *could not be treated as otherwise than "wilful"* and therefore clearly came within one of the exceptions to the granting of relief as contained in section 3275, California Civil Code, and likewise held a subletting was a breach of condition not susceptible of being compensated in money.

4. California Decisions Hold That Relief May be Granted Under Section 3275 in Cases Involving Conditions Either Subsequent or Precedent.

In a very recent case the California Supreme Court held that section 3275, California Civil Code, in a proper case was applicable to a contract involving conditions either precedent or subsequent.

> *O'Morrow v. Borad,* 27 Cal. (2d) 794, 167 P. (2d) 483, 487.

That case involved a provision in a public liability insurance policy making it a condition to liability of the insurer that the insured cooperate in the defense of any claim.

In its opinion the Court states that such a condition has been sometimes held to be a condition subsequent and sometimes held to be a condition precedent "but regardless of the name given to the provision the insurer is ordinarily released—" but "forfeitures, however, are not favored; hence a contract, and conditions in a contract, will if possible be construed to avoid forfeiture." (Citing cases.) "This is particularly true of insurance contracts." (Citing cases.) "And where, as in the insurance policies held by O'Morrow the condition is express and cannot be avoided by construction, the Court may in a proper case excuse compliance with it, or give equitable relief against enforcement. (See Civ. Code, sections 3275, 3369.)" (Citing numerous California decisions.)

In addition to reviewing the cases cited by petitioners under their points F and G and showing that they do not support petitioners' contention, respondent has cited decisions of the California courts that an agreement in a lease for an extension vests an interest in the land in

the lessee and is not an ordinary option, and that section 3275, California Civil Code, may be applied to a case where time is made of the essence and also in cases of conditions subsequent or precedent.

Respondent has cited a California decision that the acceptance of royalties after default waives all defaults.

Furthermore respondent contends that in this action at the time petitioners were requested to comply with their agreement for an extension any defaults that had existed had been cured and at that time there was no question of faithful compliance.

Respondents contend that even in an ordinary option contract with time of the essence and providing for monthly payment for a year as a condition precedent to an obligation of the optionor to convey if the optionor accepts belated payments during the year he may not refuse to convey if at the end of the year he has received and accepted the full option price. There is certainly no California decision to the contrary of that statement, and it illustrates the situation in the instant case.

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